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In the

Supreme Court of the United States

OCTOBER TERM, 1970

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,
Petitioners,

vs.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A. Proceedings in the U. S. District Court for the Northern District of Illinois, Eastern Division in the case of Roger Boshes, et al. v. General Motors Corporation, No. 68C-1454

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROGER BOSHES, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.
No. 68 C 1454

"MOTIONS FOR SUCCESSIVE ALTERNATIVE ORDERS TO TREAT CIVIL RULE 22 IN SUBSTANTIAL EFFECT AS AN INJUNCTION, AND TO MODIFY OR DISSOLVE SUCH INJUNCTION, AND FOR OTHER RELIEF; OR TO DECLARE SAID CIVIL RULE 22 NULL AND VOID; OR TO EXPUNGE SAID CIVIL RULE 22"

Come now plaintiffs and move the Court in successive alternative order:

First, To construe and treat Civil Rule 22 of this Court adopted April 15, 1970, insofar as applied to this case as being in substantial effect an injunction, and to modify and dissolve such injunction so as to declare and establish the

right of, and to permit and authorize plaintiffs and/or their counsel to make communications concerning this action with certain potential or actual class members, to-wit: the several States of the United States, through their respective Attorneys General, who are not formal parties to this action, without subjecting such communications to prior censorship by the Court, and without subjecting such communications to the prior entry by the Court of any order approving such communications; and without subjecting such communications to subsequent disclosures to the Court and/or counsel, except for good cause shown, or (if that relief be denied,)

Second, To declare said Civil Rule 22 null and void; for violation of the First Amendment to the U. S. Constitution and as being beyond the rule-making powers of this Court or (if that relief be denied,)

Third, To expunge Civil Rule 22 of this Court for violation of the First Amendment to the U. S. Constitution and as being beyond the rule-making powers of this Court.

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By .....

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROGER BOSHES, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.
No. 68 C 1454

MEMORANDUM IN SUPPORT OF MOTION FOR SUCCESSIVE ALTERNATIVE ORDERS, ETC.

I.

CIVIL RULE 22 IS IN SUBSTANTIAL EFFECT AN INJUNCTION.

U.S. v. *Cities Service Co.*, 410 F.2d 662, 663, Note 1.
Hotel, etc. Union, etc. v. *Del Valle*, 328 F.2d 885
McCoy v. *Louisiana State Board of Education*, 345 F.2d 720

II.

CIVIL RULE 22 IS IN SUBSTANTIAL EFFECT AN INJUNCTION. IT WAS ADOPTED WITHOUT NOTICE. NEITHER THE ORDER ADOPTING IT NOR THE RULE ITSELF SET FORTH ADEQUATE REASONS FOR ITS ISSUANCE; ALL IN VIOLATION OF THE REQUIREMENTS OF RULE 65 OF THE RULES OF CIVIL PROCEDURE.

III.

CIVIL RULE 22 IS IN SUBSTANTIAL EFFECT AN INJUNCTION. THE COURT HAS NOT FOUND THE FACTS SPECIALLY, NOR STATED SEPARATELY ITS CONCLUSIONS OF LAW THEREON; ALL AS REQUIRED BY RULE 52 OF THE RULES OF CIVIL PROCEDURE.

See *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.* (C.A.Ill., 1963) 313 F.2d 864.

IV.

CIVIL RULE 22 IS INCONSISTENT WITH THE RULES OF CIVIL PROCEDURE, AND IS, THEREFORE, BEYOND THE POWER OF THE DISTRICT COURT TO ADOPT UNDER RULE 83 OF THE RULES OF CIVIL PROCEDURE, AND UNDER U.S.C. TITLE 28, §2071.

(a) THE NORTHERN DISTRICT OF ILLINOIS IS THE ONLY DISTRICT WHICH HAS ADOPTED A RULE OF THE NATURE OF CIVIL RULE 22. SUCH A RULE SHOULD BE UNIFORM THROUGHOUT THE FEDERAL SYSTEM, AND THERE IS NO SPECIAL SET OF CIRCUMSTANCES UNIQUELY LOCAL TO THE NORTHERN DISTRICT OF ILLINOIS, WHICH JUSTIFIES THE ADOPTION OR MAINTENANCE OF THE RULE AS A LOCAL RULE.

See *Monarch Inc. Co. of Ohio* v. *Spach*, 281 F.2d 401 (C.A., Fla. 1960)

V.

CIVIL RULE 22 ABRIDGES THE SUBSTANTIVE RIGHTS OF PLAINTIFFS AND MEMBERS OF THEIR CLASS, CONTRARY TO U.S.C., TITLE 28, §2072.

THE RIGHT TO COMMUNICATE WITHOUT PRIOR CENSORSHIP OR RESTRAINT IS A SUBSTANTIVE RIGHT.

VI.

CIVIL RULE 22 IS IN VIOLATION OF THE FIRST AMENDMENT AS AN UNWARRANTED PRIOR RESTRAINT ON THE PLAINTIFFS' AND THEIR ATTORNEYS' FIRST AMENDMENT RIGHTS TO FREEDOM OF SPEECH, AND TO PEACEABLY ASSEMBLE TO PETITION THE GOVERNMENT FOR REDRESS OF THEIR GRIEVANCES.

Chase v. *Robson*, No. 18424, U.S. Court of Appeals, Seventh Circuit, Order for the Issuance of a Writ of Mandamus of May 1, 1970 (not reported).

VII.

THIS MOTION SHOULD BE GRANTED AND OPPORTUNITY TO CONSULT WITH OTHER MEMBERS OF THE PLAINTIFFS' CLASS SHOULD BE AFFORDED BEFORE THE COURT PASSES ON THE MOTION TO STRIKE THE COMPLAINT HERETOFORE FILED BY THE DEFENDANT HEREIN; OTHERWISE ANY ORDER ADVERSE TO THE COMPLAINT ENTERED ON SAID MOTION WILL DENY THE PLAINTIFFS AND THE OTHER MEMBERS OF THEIR CLASS DUE PROCESS OF LAW, CONTRARY TO THE FIFTH AMENDMENT.

Respectfully submitted,

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Attorneys for Plaintiffs,
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By .....

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROGER BOSHES, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.

No. 68 C 1454

MOTION FOR RULE 23 ORDER

Come now the plaintiffs and move the Court to determine by order pursuant to Rule 23 of the Rules of Civil Procedure that this action is to be maintained as a class action, and to make such orders regarding notice to the members and alleged members of the class as may be appropriate or necessary under the Constitution, the laws, and the Rules.

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By .....

UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Judge Campbell
Cause No. 68 C 1454 Date Oct 6 1970
Title of Cause—Boshes vs General Motors
Brief Statement of Motion—Motion for Orders under Rule 23 & Rule 22 Order den

Motion for orders under Rule 22 and Rule 23 are denied
/s/ W.J.C.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROGER BOSHES, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.
No. 68 C 1454

NOTICE OF APPEAL
(Filed Nov 4 1970)

NOTICE is hereby given that Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor, plaintiffs herein, each in his own behalf and on behalf of all others for whom this action is brought, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the order entered in this action on October 6, 1970, denying motions for successive alternative orders to treat Civil Rule 22 in substantial effect as an injunction, and to modify or dissolve such injunction, and for other

relief; or to declare said Civil Rule 22 null and void; or to expunge said Civil Rule 22.

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IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROGER BOSHES, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.
No. 68 C 1454

NOTICE OF APPEAL
(Filed Nov 4 1970)

NOTICE is hereby given that Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor, plaintiffs herein, each in his own behalf and on behalf of all others for whom this action is brought, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the order entered in this action on October 6, 1970 denying the motion of plaintiffs that the court determine by order pursuant to Rule 23 of the Rules of Civil Procedure that this action is to be maintained as a class action, and to make such orders regarding notice to the members and alleged members of the class as may be appropriate or necessary under the Constitution, the laws and the rules.

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APPENDIX B

Proceedings in the U.S. Court of Appeals for the Seventh Circuit in consolidated appeals Nos. 18939 and 18940.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ROGER BOSHES, et al.,
Appellants,
v.
GENERAL MOTORS CORPORATION,
Appellee.
} Nos. 18939, 18940

APPELLEE'S MOTION TO DISMISS APPEALS AND MEMORANDUM IN SUPPORT THEREOF

Defendant-appellee hereby moves the Court to dismiss these appeals because the order appealed from simply deferred any ruling by the district court with respect to plaintiffs-appellants' procedural motions until such time as the legal sufficiency of the complaint was determined.

This case was brought by five automobile owners, appellants here, as a purported class action on behalf of all persons who purchased General Motors passenger cars during the four years immediately preceding the filing of the complaint, seeking to recover treble damages on the theory that defendant General Motors Corporation violated the antitrust laws by "conspiring" with itself or with or among its internal passenger car divisions in establishing the prices for new General Motors cars. General Motors filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, and the final memorandum of the parties briefing that motion was filed on August 14, 1970.

Almost two months later, and while the motion to dismiss was under submission, plaintiffs filed two procedural motions. In the first, they asked that Rule 22 of the Civil Rules for the Northern District of Illinois be modified, declared null and void, or held unconstitutional. Rule 22 provides that in every class action no communication concerning the action shall be made by any of the parties or their counsel with any potential or actual class member who is not a formal party to the action, until such time as an order may be entered by the court approving the communication. Plaintiffs' motion was made apparently for the purpose of allowing them to communicate with State attorneys general without supervision of the district court. In their second motion, plaintiffs asked the district court to proceed to make the requisite class action determination under Rule 23 of the Federal Rules of Civil Procedure.

Pointing out that it had not yet ruled on the pending motion to dismiss, the district court denied plaintiffs' motions with leave to reinstate:

> "I think I would rather finish what I am doing now. Your motion is denied. I will rule on what is pending before me now, which was fully submitted. Following that, you have leave to reinstate your motion, if it appears appropriate." (Tr. at 3-4, Oct. 6, 1970).

Since the filing of plaintiffs' notices of appeal, the district court granted defendant's motion to dismiss the complaint insofar as it purports to state a claim based on Section 1 of the Sherman Act and the so-called intra-corporate conspiracy theory. (Order, Dec. 11, 1970; copy attached hereto as Appendix A). The court also granted General Motors additional time within which to answer or otherwise plead with respect to the remaining allegations of the complaint, which consist essentially of an amendment to the complaint filed by plaintiffs on August 27, 1970. In that amendment plaintiffs allege additional violations of the

antitrust laws unrelated to their initial charge of intra-corporate conspiracy. Significantly, in granting defendant's motion to dismiss, the court below said:

> "The motions seeking a determination that this is a proper class action brought pursuant to Rule 23 and other questions under Rule 23 and Local Rule 22 will be considered if and when the court concludes that plaintiffs' complaint states a claim upon which relief can be granted." (Order, Dec. 11, 1970).

In the light of the above, appellee General Motors moves this Court to dismiss the appeals on the ground that no jurisdiction exists for appellate review of an order deferring consideration of routine procedural motions or even a denial of those motions.

ARGUMENT

PLAINTIFFS-APPELLANTS' MOTIONS WERE NOT DECIDED; CONSIDERATION OF THEM WAS SIMPLY DEFERRED.

Although the district court "denied" plaintiffs' motions on October 6, 1970, it is clear that the court was not ruling on the merits of the motions or reaching any decision with respect to them. Rather, the court concluded only that it would not rule on the motions until the preliminary question of the sufficiency of the complaint was determined.* The court's subsequent order of December 11, 1970 confirms that plaintiffs' motions had not been decided and that final consideration of them was being deferred until the remaining issues of the sufficiency of the complaint were determined.

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* The district court no doubt recognized the inefficiency inherent in determining the class action issues or permitting communication with alleged class members regarding an action the court might shortly dismiss for failure to state a claim.

Appeals to this Court may be had only to review a final decision of the district court, 28 U.S.C. §1291, or to review an order granting or denying an injunction or the dissolution of an injunction, 28 U.S.C. §1292(a).** The October 6 order is plainly not a final decision under Section 1291 in any respect since it reaches neither substantive issues nor even the merits of the motions. Morover, the order is not one refusing to dissolve an injunction, as plaintiffs would apparently characterize it, but rather only a deferral of the court's consideration of the issues relevant to either dissolving or refusing to dissolve any injunctive effects of Local Rule 22.

In *Babcock & Wilcox Co.* v. *Foster Wheeler Corp.*, 415 F.2d 777 (3d Cir. 1969), the district court, in accordance with the rules of the U.S. Patent Office, denied a request for access to certain information until the appropriate stage of the proceeding was reached.* The Court of Appeals for the Third Circuit dismissed an appeal from the district court's order because it lacked sufficient finality to be appealable and noted that, as here, "the district court's order denying the motion recited that its denial was without prejudice to appellant's right to renew its motion" at an appropriate time, so that the attempted appeal merely sought "a review of the propriety of district court action which did not determine the merits of appellant's motion and which did not have the effect of prejudicing the appellant." 415 F.2d at 778.

** 28 U.S.C. §1292(b), which provides for permissive review of certain interlocutory orders, is not involved here since plaintiffs did not seek certification of the district court's order.

* Local Rule 22 is analogous to the Patent Office rule in that it restricts certain communications until an appropriate order of the district court issues.

Even in the unlikely event that Local Rule 22 should be construed to be an injunction, and the October 6 order were considered to have been a refusal to dissolve it, that refusal would not be reviewable under §1292(a)(1), which was intended to apply only to interlocutory orders temporarily granting or denying part or all of the ultimate relief sought by the complaint.** See 9 Moore, *Federal Practice* ¶110.20[1], at 233-235 (2d ed. 1970); *Stricklin* v. *Regents of the Univ. of Wisconsin*, 420 F.2d 1259, (7th Cir. 1970). For example, in *Whittle* v. *Tawes*, 343 F.2d 428 (4th Cir. 1965), which was an action against the governor of Maryland to compel him to investigate the circumstances surrounding the death of the plaintiff's brother, the defendant moved to dismiss the complaint. An order was then entered deferring the taking of depositions by the plaintiff pending disposition of the motion to dismiss. In dismissing an appeal from that order, the Court of Appeals for the Fourth Circuit explained:

> "This is a routine procedural step in the normal administration of the case and obviously not the type of order that may be reviewed before the final determination of the case, and 28 U.S.C.A. §1292(a)(1), upon which the appellant relies, is inapplicable." *Ibid.*

See also *International Prods. Corp.* v. *Koons*, 325 F.2d 403, 406 (2d Cir. 1963).

Plaintiffs-appellants here, as in *Babcock & Wilcox* and *Whittle*, seek to appeal a procedural ruling which reaches neither the merits of the underlying action nor the merits of the motions themselves. Consequently, even if the Octo-

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** Only with respect to their motion concerning Local Rule 22 can plaintiffs possibly characterize the October 6 order as one refusing to dissolve an injunction. Section 1292(a)(1) is clearly inapplicable to the deferral of plaintiffs' motion for a Rule 23 class action determination, particularly since the time for making that determination lies within the discretion of the district court.

ber 6 order were considered a "denial" rather than a deferral of their motions, the appeals should be dismissed.

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Dated: January 4, 1971

Respectfully submitted,

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UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Judge Campbell

Cause No. 68 C 1454 Date Dec 11 1970

Title of Cause—Roger Boshes, et al vs General Motors Corporation

Brief Statement of Motion—Order

Defts. motion to dismiss the complaint is granted insofar as the same is based on Sec. One of the Sherman Act (15 U.S.C. 51) and the theory of an inter-corporate conspiracy.

Joseph E. Seagram and Son, Inc. vs Hawaiian Oke & Liquors, Ltd., 416 F. 2nd 71 (9th Cir. 1969) *Cliff Food Store Inc. vs Kroger, Inc.*, 417 F 2nd 203 (5th Cir. 1969) In all other respects the motion to dismiss is denied. Deft. shall answer or plead to the remaining allegations to the complaint within 20 days of this date. The motions seeking a determination that this is a proper class action brought pursuant to Rule 23 & other questions under Rule 23 and Local Rule 22 will be considered if and when the court concludes that plaintiffs complaint states a claim upon which relief can be granted. (Draft)

/s/ W.J.C.

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, et al., Plaintiffs-Appellants v. GENERAL MOTORS CORPORATION, Defendant-Appellee	Nos. 18939 and 18940

OBJECTIONS TO MOTION OF GENERAL MOTORS CORPORATION, DEFENDANT-APPELLEE, TO DISMISS THESE APPEALS

I.

Plaintiffs-Appellants object to General Motors Corporation's motion to dismiss these appeals. Plaintiffs-Appellants urge that the motion be denied, or perhaps preferably, that the motion be taken with the case, and considered also in connection with the Petitions for Mandamus filed concomitantly hereto (as this Court did in the Order entered by it on May 1, 1970, in No. 18424, *Chase* v. *Rob-*

son, Judge, and No. 18417, *United States* v. *Chase.*) (Not reported.)

II.

Jurisdiction of both of these appeals is asserted by plaintiffs-appellants under 28 U.S.C.A. §1291, as construed in a line of cases of which *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 545, 546; 69 S.Ct. 1221, 1225, 1226; 93 L.Ed. 1528, is an exemplar.

Jurisdiction of the appeal from the order denying the motion to treat Local Rule 22 of the Rules of the United States District Court for the Northern District of Illinois as an injunction and denying the motion to modify or dissolve the injunction, is asserted further under 28 U.S.C.A. 1292(a)(1).

III.

The questions presented on the motion to dismiss are as follows:

A. With regard to Local Rule 22 of the Rules of the United States District Court for the Northern District of Illinois,

1. Whether said Local Rule 22 is in substantial effect an injunction.

2. Whether the order denying plaintiffs' motion to modify or dissolve such injunction to the end that plaintiffs and their counsel may communicate with the Attorneys General of the several States (which States and their political subdivisions are potential and actual class members):

a) Is an order which is appealable under 28 U.S.C.A. 1292 (a)(1) as an order refusing to dissolve or modify an injunction, and/or

b) Is an order which in a "practical rather than a technical sense" is "fundamental to the

further conduct of the case", "touching matters that will not affect or be affected by, the decision on the merits", "the practical effect of which "will be irreparable by any subsequent appeal", so as to be appealable under 28 U.S.C.A. §1291.

B. With regard to Rule 23(c)(1) of the Rules of Civil Procedure, whether an order denying, and/or indefinitely postponing ruling upon, a motion made in an action brought as a class action, more than two years after the commencement of the action, that the court determine by order whether it is to be so maintained, and that the court direct notice to the members of the class, is appealable under 28 U.S.C.A. 1291, as being in a "practical rather than a technical sense" "fundamental to the further conduct of the case," "touching matters that will not affect or or be affected by the decision on the merits", the practical effect of which "will be irreparable by any subsequent appeal", and "too independent of the cause itself to require that appellate consideration be deferred until the whole cause is adjudicated."

THE RULES OF COURT INVOLVED

Rule 22 of the Local Rules of the United States District Court for the Northern District of Illinois:

"Rule 22. For Prevention of Potential Abuse of Class Action. In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.

"Attorneys will be required to comply with the provisions of Rule 39 of the General Rules of this Court."

Rule 23(c)(1) and (2) of the Rules of Civil Procedure for the United States District Courts:

"(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under the subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

THE NATURE OF THE CASE

On August 6, 1968 a class action in equity was brought by the plaintiffs, Roger Boshes and four other persons who purchased General Motors passenger automobiles as consumers, on behalf of all such purchasers within the four preceding years and on behalf of subsequent purchasers, to recover money damages and costs from General Motors Corporation, for violations of Sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§1 and 2) and Section 7 of the Clayton Act (15 U.S.C.A. §18), and for such other relief as might be available to the class. The class consists of some millions of persons.

The claim of liability in the original complaint for damages under Section 1 of the Sherman Act, is predicated

upon allegations that the Buick, Cadillac, Chevrolet, Oldsmobile and Pontiac Divisions of General Motors were originally independent corporations which had combined with each other into General Motors Corporation and were substantially independent business entities (see *General Motors Corp* v. *Washington,* 377 U.S. 436, 84 S.Ct. 1564), that they were in competition with each other in the market for American style cars, and that they had combined to fix prices; as a result of which General Motors charged higher prices to members of plaintiffs' class than it would have if there had been no combination to fix prices. (The question of whether a "division" is similar to a subsidiary corporation with regard to liability of the parent for a combination or conspiracy with the parent company has been presented to and noted by the Court, but not yet passed on by that Court. *Poller* v. *C.B.S.*, 368 U.S. 464, 469; 82 S.Ct. 486, 489 (Footnote 4). (See in this connection the brief filed in the District Court, Record, 150).

The claim of liability for damages under Section 2 of the Sherman Act is based upon allegations that during the period in question, General Motors Corporation as a combination of the original 5 companies had monopoly power in the relevant market; that its profits were so great that it could reduce prices to a point where all its competitors could be driven from the relevant market and yet it could still make a profit; that for the same reason it had the power to prevent new competitors from entering the relevant market; that it had attained and maintained this power by combination, conspiracy to fix prices and other unlawful acts.

The precise claims to other relief were not spelled out specifically in the pleadings, but in the briefs attention of the court was directed to the fact that a decree of divestiture under Section 7 of the Clayton Act could be appropriate under *Dupont I,* 353 U.S. 598, 77 S.Ct. 880; *Cas-*

cade Natural Gas Co. v. *El Paso Natural Gas Co.*, 87 S.Ct. 932, 937, 386 U.S. 129, 136. (See Record 154).

On October 6, 1970, Amendment No. 1 to the Complaint was filed by leave of court (Rec. 236-318). This amendment spelled out additional claimed violations of the antitrust laws arising out of the creation and maintenance by General Motors of hundreds of retail-dealership subsidiary corporations with which General Motors combined and conspired to fix retail prices, etc., which violations would justify granting relief by way of damages, and e.g., divestiture and injunction.

THE COURSE OF PROCEEDING.

Since the filing of the complaint on August 6, 1968, numerous orders of extension of time to file a responsive pleading were entered from time to time pursuant to stipulation. Ultimately, on March 23, 1970—more than 20 months after the complaint was filed—General Motors filed a motion to dismiss the complaint. (Rec. 126-127). The issues were extensively briefed by the plaintiffs and defendant, and the last brief was filed on August 14, 1970 (Rec. 209-213). (The trial judge held the motion under advisement and did not rule on it until December 14, 1970 after these appeals were taken.)

On September 28, 1970, plaintiffs filed two motions:

First, a motion that Local Rule 22 of the District Court be construed as an injunction, and to modify or dissolve the injunction so that plaintiffs might enter into communication concerning this action with the Attorneys General of the States (the States being actual or potential class members), or in the alternative, to declare Local Rule 22 void and/or expunge it as being in violation of the First Amendment and the Fifth Amendment, and beyond the rule-making powers of the District Court (Rec. 228-229).

Second, a motion for the District Court to determine by order pursuant to Rule 23 of the Rules of Civil Procedure that this action is to be maintained as a class action, and to provide for appropriate notice to the alleged members of the class (Rec. 226).

Both motions were denied on October 6, 1970. (The transcript of the hearing shows that the District Judge stated that they might be renewed at an unspecified later date (Transcript October 6, 1970, pp. 3-4). This does not appear in the order of denial (Rec. 235).

On November 4, 1970, plaintiffs filed Notices of Appeal to this court from the order of October 6, 1970 denying plaintiffs' motions with regard to Local Rule 22, and Rule of Civil Procedure 23.

General Motors has obtained an extension of time to answer or plead to the "remaining allegations of the complaint" until March 3, 1971 and has as yet filed no response.

On October 6, 1970 the plaintiffs were granted leave to and did file "Amendment No. 1 to the Complaint" (Rec. 318, 236-315).

On December 14, 1970 (more than 2 months later), the District Court entered an order (Appellee's Motion to Dismiss in this Court, Appendix A) that:

a) Defendant's motion to dismiss the complaint was "granted insofar as it is based on Section 1 of the Sherman Act and the theory of intra-corporate conspiracy."

b) In all other respects the motion to dismiss was denied.

c) "Defendant shall answer or plead to the remaining allegations of the complaint."

d) "The motions seeking a determination that this is a proper class action brought pursuant to Rule 23 and other questions under Local Rule 22 will be con-

sidered if and when the court concludes that plaintiff's complaint states a claim upon which relief can be granted."

THE DISPOSITION IN THE COURT BELOW.

The disposition in the court below is difficult to understand.

On October 6, 1970, the District Court entered the following categoric order (Rec. 235):

"Motions for orders under Rule 22 and Rule 23 are denied."

On November 4, 1970, plaintiffs' Notices of Appeal to this Court were filed with the District Court Clerk.

(Plaintiffs have not renewed the motions for orders under Rule 22 and Rule 23.)

On December 14, 1970, more than two months after the entry of the order of denial and more than a month after the filing of the Notices of Appeal, the District Court *sua sponte* entered the following orders:

"The motions seeking a determination that this is a proper class action brought pursuant to Rule 23 and other questions under Rule 23 and Local Rule 22 will be considered if and when the Court concludes that plaintiffs' complaint states a claim upon which relief can be granted." (Appellee's Motion to Dismiss Appeals, p. 7).

But these motions were no longer before the District Court! The motions had been denied; the denials had been appealed from; and jurisdiction with relation to the motions had been transferred to this Court of Appeals by the filing of the Notices of Appeal; *and the denials appealed from still stand.*

BRIEF

PRELIMINARY REMARKS

This suit is perhaps one of the three most important antitrust cases (the other two being *Standard Oil Co. of New Jersey* v. *U.S.*, 31 S.Ct. 502, 221 U.S. 1; *United States* v. *American Tobacco Co.*, 31 S.Ct. 632, 221 U.S. 106.)

It is a class suit brought by five consumer-purchasers, asking for damages for the class in quite large amounts and for divestiture, injunction and other equitable relief. It presents many questions of first impression. Plaintiffs are pitted against the $23 Billion General Motors colossus. The suit presents many serious problems of policy and strategy. Should all possible causes of action be searched out and asserted, or should the suit be pressed only on those causes of action which can be disposed of most expeditiously? There are millions of persons who are members of the consumer-class. Many of them have already died; some millions of them will certainly be dead before this suit ends if the case takes the conventional 10-to-25 year course (see, e.g. *Gottesman* v. *General Motors Corp.*, et al., 414 F.2d 965 and still pending. *Gottesman* is based on *DuPont I*, 77 S.Ct. 872, 353 U.S. 586, which had been instituted in 1949. See also *Cascade National Gas Corporation* v. *El Paso Natural Gas Company*, 386 U.S. 129, 87 S.Ct. 932, commenced in 1957 and still pending in June, 1969. *Utah Public Service Commission* v. *El Paso Natural Gas Co.*, 89 S.Ct. 1860, 395 U.S. 464. See also *Perkins* v. *Standard Oil Co. of Cal.*, 89 S.Ct. 1871, 1875, 395 U.S. 642, 650, commenced in 1959, concluded in 1969).

The amount which might be recovered for each member of the class (or his estate) is comparatively not large, and has been and will be depreciated by the general inflation. Should plaintiffs look for a bird in the hand rather than for two in the bush? "Justice delayed is justice denied."

Questions of limitations in class suits exist, and have not yet been authoritatively settled. Did the filing of the suit toll limitations as to the members of the class? If the suit is dismissed without notice to them, and they have no knowledge of the dismissal, what are their rights?

It is with regard to the foregoing matters among others, that communication and consultation with representative members of the class is desired. The most representative members are the States, each of whom (together with its political subdivisions) is a large consumer-purchaser of automobiles from General Motors.

The object of these appeals and the mandamuses being filed concomitantly with them is to enable plaintiffs as "private attorneys general", as "representatives of the public interest" (*Flast* v. *Cohen,* 88 S.Ct. 1942, 1963, 392 U.S. 83, 120), as well as of their class, to obtain First Amendment rights of communication, assembly and petition, and the Fifth Amendment right of due process of law, for themselves and their class.

POINTS AND AUTHORITIES

A.

WITH REGARD TO LOCAL RULE 22

I.

Local Rule 22 is in substantial effect an injunction.

United States v. *Cities Service Co.,* 410 F. 2d 662, 663, footnote 1

Hotel & Restaurant Employees and Bartenders' Int'l Union etc. v. *Del Valle,* 328 F. 2d 885

McCoy v. *Louisiana State Board of Education,* 345 F. 2d 720

Independent Petroleum Workers of New Jersey v. *Esso Standard Oil Co.,* 235 F. 2d 401

II.

The order of the District Court *denying* plaintiffs' motion that Civil Rule 22 be treated as an injunction, and *denying* plaintiffs' motion that the District Court modify or dissolve such injunction so as to declare and establish the right of and to permit and authorize plaintiffs and/or their counsel, to make communications concerning this action with certain potential or actual class members, to-wit, the several states of the United States, through their respective Attorneys General, was an order denying a motion to dissolve or modify an injunction, and hence is appealable under 28 U.S.C. 1292 (a) (1).

Hyde Construction Co. v. *Koehring Co.*, 388 F. 2d 501

Rivers v. *Miller*, 112 F. 2d 439

American Grain Sep. Co. v. *Twin City Sep. Co.*, 202 F. 2d

See:

A. & E. Plastick Pak Co. v. *Monsanto Company*, 396 F. 2d 710

H. W. Caldwell & Son Co., Inc. v. *U. S. etc.*, 407 F. 2d 21

III.

The order is likewise appealable under 28 U.S.C. 1291 as an order which in a practical rather than a technical sense is fundamental to the further conduct of the case, touching matters that will not affect or be affected by, the decision on the merits, and the practical effect of which will be irreparable by any subsequent appeal.

Gillespie v. *United States Steel Corporation*, 85 S. Ct. 308, 379 U.S. 148

Cohen v. *Beneficial Industrial Loan Corporation*, 69 S. Ct. 1221, 337 U.S. 541

Chabot v. *National Securities and Research Corporation*, 290 F. 2d 657

And see:

United States v. *General Motors Corporation*, 323 U.S. 373, 377, 65 S. Ct. 357, 359

IV.

The invitations to plaintiffs by the District Court to renew at some later date their motions to modify or dissolve the Local Rule 22 injunction could not and did not deprive plaintiffs of their right to appeal.

Pan American World Airways, Inc. v. *Flight Engineers International Assn., etc.*, 306 F. 2d 840

National Mediation Board v. *Air Pilots Association, etc.*, 323 F. 2d 305

Missouri-Kansas-Texas R. Co. v. *Randolph*, 182 F. 2d 886

David v. *Hayden*, 238 F. 734

Schainman v. *Brainard*, 8 F. 2d 11

Western Union Telegraph Co. v. *United States & Mexican Trust Co.*, 221 F. 545

Boeing Co. v. *International Union, etc.*, 370 F. 2d 969

B.

WITH REGARD TO THE DENIAL OF PLAINTIFFS MOTION FOR A RULE 23 DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; AND FOR NOTICE.

V.

A. Rule 23 determination as to whether the action should be maintained as a class action should be made at an early stage of the case.

Philadelphia Electric Co. v. *Anaconda American Brass Co.*, 42 F.R.D. 324

Hardy v. *U. S. Steel Corp.*, 289 F. Supp. 200

Weissman v. *M. C. A. Inc.*, 45 F.R.D. 258

Clark v. *American Marine Corp.*, 297 F. Supp. 1305

See:

Eisen v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564-565

VI.

In any event, a determination as to whether the action should be maintained as a class action, should be made before the District Court rules that the complaint is insufficient in any respect, since the rights of the absent members of the class are thereby affected.

Clark v. *American Marine Corps.*, 297 F. Supp. 1305, 1306

Eisen v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564-565

Cranston v. *Freeman*, 290 F. Supp. 785, 787-788

VII.

The order refusing to make the determination under Rule 23 as to whether the action is to be maintained as a class action, and the refusal to give notice, combined with the inhibitions of Local Rule 22, and with the fact that the cause of action under Section 1 of the Sherman Act has been held not to exist, is an order which is appealable under 28 U.S.C. 1291, because in a practical rather than a technical sense it is fundamental to the further conduct of the case, touching matters that will not affect or be affected by, the decision on the merits, and the practical effect of which will be irreparable by any subsequent appeal.

Gillespie v. *United States Steel Corporation*, 85 S. Ct. 308, 376 U.S.

Cohen v. *Beneficial Industrial Loan Corporation*, 66 S. Ct. 1221, 337 U.S. 541

Chabot v. *National Securities and Research Corporation*, 292 F. 2d 657

ARGUMENT

A.

The order of November 6, 1970, denying plaintiffs' motion compelled by Local Rule 22, for leave to communicate with the States Attorneys General, was in substantion effect an interlocutory order refusing to dissolve or modify an injunction.

I.

Local Rule 22 is in substantial effect a temporary injunction. It is no different in any way, for example, from the usual and customary injunction entered in a labor case against communication by picketing, or in a covenant-against-competition case against communication with customers. It is a sweeping "general injunction", comparable with the "general warrants" which James Oatis successfully resisted. It is a part of the proceedings "in every action brought as a class action under Rule 23 of Federal Rules of Civil Procedure."

The order denying plaintiffs' motion under Local Rule 22 is an interlocutory order refusing to modify or dissolve an injunction. In determining the existence of an interlocutory order, this court will look to its substantial effect rather than its terminology.

United States v. *Cities Service Co.*, 410 F. 2d 662, 663, Footnote 1.

Hotel etc. Union v. *Del Valle*, 328 F. 2d 885

McCoy v. *Louisiana State Board of Education*, 345 F. 2d 720

Even if Local Rule 22 were claimed to be a temporary restraining order, it became tantamount to an injunction after 20 days (*National Mediation Board* v. *Air Line Pilots Association, Intern.*, 323 F. 2d 305; *Pan-American World Airways, Inc.* v. *Flight Engineering International Association, etc.*, 306 F. 2d 840), and the interlocutory order denying for the time being the motion to dissolve or modify it became appealable as an interlocutory order refusing to dissolve or modify an injunction, under 28 U.S.C. 1292 (a) (1).

(In *United States* v. *Chase*, No. 18417, not reported, in this Court in an analogous situation elected not to pass on the question of appealability, preferring to award mandamus. See order of May 1, 1970 in No. 18417, p. 5).

II.

The order denying plaintiffs leave to communicate with the States Attorneys General is appealable under 28 U.S.C. §1291.

There is a line of cases, of which *Gillespie* v. *United States Steel Corporation*, 85 S.Ct. 308, 379 U.S. 148 appears to be the latest, which allows an appeal under 28 U.S.C. §1291 from an order which is not final in the sense that the order is "not necessarily the last order possible to be made in the case."

Certain tests have been laid down in these cases:

1. *Is the order one which in a "practical rather than a technical sense" is "fundamental to the further conduct of the case?"*

We believe that the order which denies us leave to communicate with the State Attorneys General is such an order.

Plaintiffs are 5 individual automobile consumer-purchasers, suing on behalf of all consumer purchasers. They

are pitted against General Motors, a $23 billion dollar colossus. The resources of General Motors for defense are practically limitless. General Motors has persuaded the District Court to rule that no cause of action exists under Section 1 of the Sherman Act. This ruling directly affects all other members of the class (although they have not received notice or hearing). This might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands (*Gillespie*, 85 S. Ct. 308, 311, 379 U.S. 148, 153).

Plaintiffs desire to consult with the State Attorneys General concerning the posture of the case, and the tactics and strategy to be followed. Such consultation in a "practical rather than a technical sense" is "fundamental to the further conduct of the case." The States themselves are large consumer-purchasers, as are their municipalities; and are important members of the consumer-purchaser class. While no single State, and perhaps not all the States in conjunction, can or will marshall resources comparable to those which General Motors can, and will if so advised, pour into this struggle, thre will be at least a comparability of the litigious power which simply does not exist in the present remarkable and hitherto unheard-of situation where plaintiffs are totally barred from communicating concerning this case with probably more than half of the adults of the Nation!

There are problems of the Statute of Limitations. There are problems of selectivity of causes of action. It is noteworthy that the *DuPont-General Motors* Clayton Act litigation, bitterly fought, which commenced in 1949, and which resulted in civil litigation for damages in a derivative stockholders suit, is not yet terminated! We should like to consult with the Attorneys General of the States for the pur-

pose of developing a strategy which will avoid a possible twenty-year litigation during which millions of our consumer-class will have died.

(It should be noted that Rule 22 in no way inhibits a *defendant* from communicating with whomsoever it chooses. *We are gagged;* General Motors, directly or indirectly, can communicate with anybody!)

2. *Will the "practical effect" of denial of an appeal at this time "be irreparable by a subsequent appeal."*

The District Court has already ruled adversely to the plaintiffs' class on the "divisions" claim under Section 1 of the Sherman Act. Would it be sound strategy for plaintiffs, *at this stage of the case* to ask the trial judge for a statement under 28 U.S.C. 1292 (b) and if granted take an immediate appeal on that issue? Plaintiffs would like to consult with strong fellow class-members on this issue. Prior to the adoption of Local Rule 22 they could have done so. And the consultation must be made *now*, not before further rulings on the sufficiency of the class' claims are made. General Motors is free to consult with *anyone;* but the plaintiffs are not. If plaintiffs must wait until the final order in the case is made before they may consult, the practical effect of denial of appeal at this time will certainly be irreparable by a subsequent appeal.

3. *Is the order sought to be appealed from collateral to the principal litigation because touching matters that will not affect or be affected by decision of the merits of the case.*

That this is so, is so clear as hardly to require argument. How can our communication with the States Attorneys General affect or be affected by a decision of the merits of the case?

4. *Does a balancing of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other," favor the allowance of an appeal?*

As the Supreme Court pointed out in *Gillespie* (85 S. Ct. 311; 379 U.S. 152), such a balancing is not always easy. We have previously pointed out some of the dangers of denying justice by delay, in this case. There are additional considerations which we respectfully urge upon the Court. Local Rule 22 is an innovation in the law; this Court, in its supervisory capacity over the District Court, ought to formulate guidelines concerning the rights of parties to communicate with members of their class in Rule 23 suits, which are becoming a continually increasing portion of the business of the Federal Courts. See *Schlagenhauf* v. *Holder*, 85 S. Ct. 234, 239, 379 U.S. 104, 112. Likewise, the preferred First Amendment rights of communication and of assembly to petition the government for redress of grievances; and the Fifth Amendment right of due process to the absent members of the class are involved. We respectfully submit that in this case at least, the balancing should weight in favor of allowing the appeal.

The order of November 6, 1970 denying plaintiffs' motion for a determination by the District Court pursuant to Rule 23 of the Rules of Civil Procedure that this action is to be maintained as a class action, and for appropriate notice to members of the class, is likewise appealable under 288 *U.S.C.A.* § 1291.

This proposition is perhaps more difficult of demonstration than the appealability of the Local Rule 22 order. It may be that this court will feel that mandamus is a more appropriate remedy. (We direct this court's attention to the practice in the Second Circuit, where

the Court of Appeals holds itself free to consider an appeal as a petition for mandamus or prohibition, *International Prods. Corp.* v. *Koons,* 32 F.2d 403, 407).

Yet, applying the tests for collateral appealability which we have previously set forth, the Rule 23 order would seem to meet their requirements:

1. Can there be any doubt that the order in a practical rather than a technical sense is fundamental to the further conduct of the case?

2. Plaintiffs wish to obtain at this time, for themselves and their class, the benefit of their First Amendment rights of communication and of assembly to petition the government for redress of their grievances; and to obtain for the members of their class, now, their due process rights of notice and hearings. The availability and exercise of these rights, *now, at this stage of the proceedings* is of the utmost importance. Will not the practical effect of denial of an appeal at this time be irreparable by a subsequent appeal, for reasons previously stated?

3. Is it not true that the order sought to be appealed from is collateral to the principal litigation because touching matters that will not affect or be affected by decision of the merits of the case? (The merits are, whether General Motors has or has not violated the anti-trust laws so as to have given to the plaintiffs' class claims upon which relief might be granted. Whether or not the case should for the time being proceed as a class action is a *collateral* matter to the merits, the class action involving essentially a question of convenience.)

4. If an appeal is available under Local Rule 22 order, would not the balancing of considerations result in the conclusion that in the interests of justice it would be better all around to consider in the same proceeding the propriety of the District Court's refusal to determine

whether the action should proceed as a class action, and what notice should be given?

We, therefore, respectfully urge that the motion to dismiss be denied, or be taken with the consolidated case, and with the petitions for mandamus or prohibition that are being filed as alternative procedures for relief.

Respectfully submitted,
A. Bradley Eben
Raymond I. Suekoff
Charles Liebman
Milton K. Joseph
By /s/ Charles Liebman
Charles Liebman, one of the attorneys for Plaintiffs-Appellants
120 W. Madison, Suite 800
Chicago, Ill. 60602
St. 2-1776

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Friday, February 12, 1971

Before

Hon. OTTO KERNER, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

ROGER BOSHES, et al.,
Plaintiffs-Appellants

v.

No. 18939, 18940

GENERAL MOTORS CORPORATION,
Defendant-Appellee

} Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This matter comes before the Court on the defendant-appellee's motion to dismiss the above entitled appeals, and the objections of plaintiffs-appellants to said motion.

On consideration whereof, IT IS ORDERED and adjudged by this Court that the above entitled appeals be, and the same are hereby DISMISSED at the cost of plaintiffs-appellants on motion of defendant-appellee.

Nos. 18939 and 18940
IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, et al.,
Plaintiffs-Appellants
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellee

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

(Filed February 25, 1971)

PETITION FOR REHEARING, OR, IN THE ALTERNATIVE TO VACATE THE ORDER OF DISMISSAL, AND TO FILE A NEW ORDER STATING THE REASONS FOR DISMIISSAL OF THE APPEALS

The plaintiffs-appellants, with the utmost deference, most respectfully petition this Court either to grant a rehearing herein, or to vacate the order of dismissal heretofore entered herein, and to file a new order stating the reasons for dismissal of the appeals.

These plaintiffs-appellants most respectfully suggest that the lack of any reported litigation at this time relating to Local Rule 22 and to the question of the appealability of orders of refusals to determine whether actions brought as class suits shall be maintained as class suits under Rule of Civil Procedure 23 and notice given to the members of the alleged class, are cogent reasons for this Court to discuss these questions in an opinion in these appeals, in order to afford sorely needed guidance to the Dis-

trict Courts and to the Bar, in this era of proliferating class actions.

Respectfully submitted,
A. Bradley Eben
Raymond I. Suekoff
Milton K. Joseph
Charles Liebman
By /s/ Charles Liebman
Attorneys for Plaintiffs-Appellants

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, March 10, 1971

Before

Hon. Otto Kerner, Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. .....

Roger Boshes, et al., Plaintiffs-Appellants v. No. 18939, 18940 General Motors Corporation, Defendant-Appellee	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED by the Court that the petition of plaintiffs-appellants for rehearing, or, in the alternative to vacate the order of dismissal, and to file a new order stating the reasons for dismissal of the appeals, be and the same is hereby denied.

Appendix C.

Proceedings in the U.S. Court of Appeals for the Seventh Circuit in original Mandamus Action entitled *Roger Boshes, et al.* v. *Honorable William J. Campbell*, Judge, etc., No. 71-1104.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, et al.,
Petitioners,
v.
HONORABLE WILLIAM J. CAMPBELL, Judge, United States District Court For The Northern District of Illinois,
No. 71-1104

(Filed Feb 5, 1971)

ORIGINAL PETITION FOR WRITS OF MANDAMUS AND PROHIBITION WITH RELATION TO AN ORDER OF DENIAL TO PETITIONERS FOR LEAVE TO COMMUNICATE WITH THE ATTORNEYS GENERAL OF THE SEVERAL STATES, WHICH ORDER HAS BEEN APPEALED FROM TO THIS COURT IN NOS. 18939 and 18940

Now comes Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor by their attorneys, A. Bradley Eben, Milton K. Joseph, Charles Liebman and Raymond I. Suekoff, and petition this court:

1. To issue a Writ of Mandamus directing the Respondent, the Honorable William J. Campbell, Judge, United States District Court for the Northern District of Illinois to vacate his order of November 6, 1970, entered in the case of *Roger Boshes, et al.* v. *General Motors Corporation*, No. 68C-1454, denying the motion of these petitioners and plaintiffs in said case for leave to communicate with the Attorneys General of the several States, which order without according the petitioners and their class due process of law impermissibly deprives these petitioners and their counsel of their First Amendment rights of freedom of

speech, and to peaceably assemble and to petition the government for a redress of their grievances.

2. To issue a rule upon the Respondent, the Honorable William J. Campbell, to show cause why a writ of prohibition should not issue to prevent him from enforcing the terms and conditions of Civil Rule 22 of District Court of the Northern District of Illinois by way of contempt proceedings or otherwise, if these petitioners and/or their counsel should communicate

(a) with the several States, who are potential or actual class members, through their respective Attorneys General: and/or

(b) With other potential or actual class members.

3. To issue its order staying proceedings in the District Court in said case No. 68C-1454, until this Court has disposed of this petition for a writ of mandamus and prohibition.

STATEMENT OF FACTS

The case below was brought on August 6, 1968, and is pending as an asserted class action, by the five plaintiffs as consumer-purchasers of General Motors automobiles, on behalf of all consumer-purchasers of General Motors automobiles within the four-year limitations period (15 U.S.C.A. §15b) as a class, to recover damages for violation by General Motors Corporation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.

The plaintiffs are ordinary, average individuals of average means and resources. It is the policy of the law that they are "private attorneys general", acting in the public interest, as well as privately. *Flast* v. *Cohen*, 88 S.Ct. 1942, 1957, 1963, 392 U.S. 83, 109, 120; *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, 14; 62 S.Ct. 875, 882.

The book value of General Motors' net worth is approximately $10 Billion. Its working capital is over $4 Billion. The present market value of its common stock is over $23 Billion.

The filing of the suit below as a class suit tolled the four-year statute of limitations as to the members of the class. *Union Carbide* v. *Nisley*, 300 F.2d 561. *Esplin* v. *Hinchi*, 402 F.2d 94, cert. den. 89 S.Ct. 1194, 394 U.S. 928, 22 L.Ed. 2nd 459. There seems to be no statutory or case law as to the effect on the class with regard to limitations of a determination by the court below (a) that there is no cause of action for damages, (b) that the case may not be maintained as a class action.

Counsel for plaintiffs desire to consult with other responsible members of the class with regard to the preservation of the rights of the class in the proceeding below. They are prohibited from doing so under pain of contempt and professional discipline by Local Rule 22 of the court below which reads as follows:

> For Prevention of Potential Abuse of Class Action. In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.

On September 28, 1970, plaintiffs made application to the court below for leave to communicate with the Attorneys General of the several States as actual or potential class members, as follows:

MOTIONS FOR SUCCESSIVE ALTERNATIVE ORDERS TO TREAT CIVIL RULE 22 IN SUBSTANTIAL EFFECT AS AN INJUNCTION, AND TO MODIFY OR DISSOLVE SUCH INJUNCTION, AND FOR OTHER RELIEF; OR TO DECLARE SAID CIVIL RULE 22 NULL AND VOID: OR TO EXPUNGE SAID CIVIL RULE 22

Come now plaintiffs and move the Court in successive alternative order:

First, To construe and treat Civil Rule 22 of this Court adopted April 15, 1970, insofar as applied to this case as being in substantial effect an injunction, and to modify and dissolve such injunction so as to declare and establish the right of, and to permit and authorize plaintiffs and/or their counsel to make communications concerning this action with certain potential or actual class members, to-wit: the several States of the United States, through their respective Attorneys General, who are not formal parties to this action, without subjecting such communications to prior censorship by the Court, and without subjecting such communications to the prior entry by the Court of any order approving such communications; and without subjecting such communications to subsequent disclosures to the Court and/or counsel, except for good cause shown, or (if that relief be denied,)

Second, To declare said Civil Rule 22 null and void; for violation of the First Amendment to the U.S. Constitution and as being beyond the rule-making powers of this Court or (if that relief be denied,)

Third, To expunge Civil Rule 22 of this Court for violation of the First Amendment to the U.S. Constitution and as being beyond the rule-making powers of this Court.

On October 6, 1970, the Respondent entered the following order:

Motion for orders under Rule 22 and Rule 23 denied

In the colloquy in connection with the order the Respondent stated:

> "Your motion is denied. I will rule on what is pending before me now, which was fully submitted. Following that, you have leave to reinstate your motion, if it appears appropriate."

Subsequently, on December 11, 1970, the Respondent entered an order dismissing the complaint insofar as it purports to state a claim based on Section 1 of the Sherman Act and the theory of an intra-corporate conspiracy; and in the same order stated:

> "The motion . . . seeking a determination . . . under . . . Local Rule 22 will be considered if and when the Court concludes that plaintiffs' complaint states a claim upon which relief can be granted."

It would be totally irrational for plaintiffs to pursue their claims except in a class action.

They will not pursue their claims as individuals, but *only* as members of the class.

Plaintiffs then appealed to this Court from the order of denial, which appeal is now pending (Nos. 18939 and 19840, Consolidated).

It being uncertain whether appeal or mandamus prohibition is the proper remedy, plaintiffs below now bring this petition for mandamus and prohibition. This proceeding is a companion proceeding to Appeals Nos. 18939 and 18940, and petitioners ask that it be consolidated with these said appeals, or heard together with them.

REASONS WHY THE WRITS SHOULD ISSUE

We would like to be able to say that Local Rule 22 is a novelty in jurisprudence, but it is analogous to the order entered by the Honorable Edwin A. Robson, Judge, in *U.S.* v. *Chase* (No. 18417 on appeal in this court), on February 24, 1970, which this Court ordered vacated in a mandamus prohibition proceeding in No. 18424, *Chase* v. *Robson.* (Order, May 1, 1970.)

Local Rule 22 is afflicted with all the infirmities noted by this Court in *Chase* v. *Robson,* No. 18424, supra.

It was entered *sua sponte* by the District Court.

It is a limitation on Petitioners' and their attorneys exercise of First Amendment rights of freedom of speech (and of their right peaceably to assemble and petition the judicial branch of the government for redress of grievances).

It is a denial of the due process rights to notice and hearing, of the members of petitioners' class.

Local Rule 22 does not contain or refer to any findings whatsoever establishing that communication between plaintiffs and actual or potential class members constitutes a serious and imminent threat to the administration of justice, or a reasonable likelihood of a serious threat to the administration of justice.

The order of October 6, 1970, denying plaintiffs leave to communicate with the Attorneys General of the several States likewise contains no such findings.

Therefore, both Local Rule 22 and the order of October 6, 1970 denying plaintiffs leave to communicate with the Attorneys General are constitutionally impermissible (Order of this Court, May 1, 1970, in No. 18424, *Chase* v. *Robson,* p. 3.

In addition, Local Rule 22 as written and as applied in the order of October 6, 1970 is constitutionally over-

broad. The Rule absolutely prohibits all communication, including communication which will not have an effect on the administration of justice along with speech which will have such an effect. The order of November 6 does the same. (See Order of this Court, May 1, 1970, in No. 18424, *Chase* v. *Robson*, pp. 4-5).

Local Rule 22 and the order of October 6, 1970 impose a prior restraint on protected First Amendment conduct. They are unrelated to the merits of the case, and wrongs caused by them may not effectively be redressed by an ultimate appeal on the merits.

Only immediate action on this Court's part can adequately eliminate the threatened constraints of free speech imposed by the order of November 6, 1970. Local Rule 22 and the order of November 6, 1970 have a chilling effect on free speech, and plaintiffs should not be forced to assert their invalidity in a contempt proceeding.

Local Rule 22 and the order of November 6, 1970 denying the right to communicate with the Attorneys General of the several States constitute a clear abuse of discretion, and are a proper subject for mandamus. (See order of this Court, May 1, 1970 in No. 18424, *Chase* v. *Robson*, p. 5.)

(Although we have not made all the Judges of the District Court parties to this proceeding, we respectfully direct this Court's attention to the fact that it has supervisory power over the rules of the District Court, and has the right to use mandamus to bar the operation of a void rule or one inconsistent with the rules of the United States Supreme Court. *Sanders* v. *Russell*, 40 F.2d 241, 244.)

We respectfully direct the Court's attention to the language of the Supreme Court in *Brotherhood of Railroad Trainmen* v. *Virginia*, 84 S.Ct. 1113, 1116, 377 U.S. 1, 5-6.

"It cannot be seriously doubted that the First

Amendment's guarantees of free speech, petition and assembly give railroad workers the right *to gather together for the lawful purpose of helping and advising one another* in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employees Liability Act, *a statutory right which would be vain and futile if the workers could not talk together freely as to the best course to follow.*" (Emphasis supplied.)

The District Court, in the absence of notice to the other members of the class, has already tentatively determined that the suit should be dismissed as far as Section 1 of the Sherman Act is concerned. The rights of the other members of the class should not be so abruptly foreclosed, without notice and an opportunity for hearing. "Equal justice under law" as the touchstone of American justice should not give so over-whelming an advantage to General Motors, the $23 billion dollar colossus.

PRAYER FOR RELIEF

Wherefore, the petitioners Roger Boshes, et al. pray that this Court:

1. Issue a writ of mandamus directing the Respondent, the Honorable William Campbell, to vacate his order of October 6, 1970 issued in the case of *Boshes, et al.* v. *General Motors*, No. 68C 1454, denying their motion for leave to communicate with the Attorneys General of the several States, Local Rule 22 *non obstante;* and imposing limitations upon the freedom of speech, of assembly, and of petition, of the petitioners and their counsel; and denying the members of petitioners' class due process rights of notice and hearing.

2. Issue a rule upon the Respondent, the Honorable William J. Campbell, to show cause why a writ of prohibition should not issue to prevent him from enforcing Local

Rule 22, at least insofar as communication between these petitioners and their counsel, and the Attorneys General of the several States are concerned.

3. Issue its order staying the proceedings in the trial court until this Court has determined the validity of such order on consideration of this petition or on the direct appeal taken from such order.

4. *Sua sponte,* in the exercise of its supervisory jurisdiction over the rule-making power of the District Courts, and its attention having been directed to Local Rule 22, hold Local Rule 22 unconstitutional for violation of the First Amendment and the due process clause of the Fifth Amendment, and for being inconsistent with the Rules of Civil Procedure of the Supreme Court.

5. Make such other order as may be appropriate to vindicate the First Amendment and Fifth Amendment rights of plaintiffs and the members of their class.

A. Bradley Eben,
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Chicago, Ill. 60602
Milton K. Joseph
Charles Liebman
Raymond I. Suekoff
120 W. Madison St.
Chicago, Ill. 60602
Tel. 368-4433

By /s/ .....
Charles Liebman,
Attorneys for Petitioners

State of Illinois)
County of Cook) SS.

Charles Liebman, being first duly sworn, on oath says that he is one of the counsel for petitioners herein; and that the allegations of fact in said petition contained are true.

.....

Charles Liebman

One of the attorneys for petitioners herein.

Subscribed and sworn to before me this
..... day of February, 1971.

.....

Notary Public

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Friday, February 12, 1971

Before

ROGER BOSHES, et al.,
Petitioners,

No. 71-1104

v.

HONORABLE WILLIAM J. CAMPBELL,
United States District Judge, etc.,
Respondent.

This matter comes before the Court on the original petition of Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor for writs of mandamus and prohibition with relation to an order of denial to petitioners for leave to communicate with the Attorneys General of the several states, which order has been appealed from to this Court in Nos. 18939 and 18940.

On consideration whereof, It Is Ordered and adjudged by this Court that the said original petition for writs of mandamus and prohibition be, and the same is hereby, Denied.

A True Copy:
Teste:
/s/ Kenneth J. Cormick
Clerk of the United States
Court of Appeals for the
Seventh Circuit.
By /s/ H. K. McCormack
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, et al.,
Petitioners,
v.
HONORABLE WILLIAM J. CAMPBELL, United States District Judge, etc.,
Respondent.

No. 71-1104
Petition for Writ of Mandamus or Prohibition

(Filed February 25, 1971)

PETITION FOR REHEARING, OR, IN THE ALTERNATIVE TO VACATE THE ORDER OF DENIAL, AND TO FILE A NEW ORDER STATING THE REASONS FOR THE DENIAL OF THE PETITION FOR MANDAMUS

The petitioners, with the utmost deference, most respectfully petition this Court, either to grant a rehearing herein, or to vacate the order of denial heretofore entered herein, and to file a new order stating the reasons for denial of the petition for mandamus.

These petitioners most respectfully suggest that the lack *of any reported litigation at this time relating to Local Rule* 22 is a cogent reason for this Court to discuss the ques-

tions raised in this mandamus with regard to Local Rule 22, in an opinion, in order to afford sorely needed guidance to the District Courts and to the Bar, in this era of proliferating class actions.

Respectfully submitted
A. Bradley Eben
Raymond I. Suekoff
Milton J. Joseph
Charles Liebman
By .....
Attorneys for Petitioners

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Thursday, April 8, 1971.
Before
Hon. OTTO KERNER, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

ROGER BOSHES, et al.,
Petitioners,
No. 71-1104
v.
HONORABLE WILLIAM J. CAMPBELL, United States District Judge, etc.,
Respondent.
} Petition for Writ of Mandamus or Prohibition

It Is Hereby Ordered by the Court that the petition for rehearing or in the alternative to vacate the order of denial filed herein on February 25, 1971, be and the same is hereby denied.

APPENDIX D

Proceedings in the U.S. Court of Appeals for the Seventh Circuit in original Mandamus action entitled *Roger Boshes, et al.* v. *Honorable William J. Campbell,* Judge, etc., No. 71-1122.

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, *et al.*,
Petitioners

v.

HONORABLE WILLIAM J. CAMPBELL, Judge, United States District Court for the Northern District of Illinois,
Respondent

No. 71-1122

ORIGINAL PETITION FOR WRITS OF MANDAMUS AND/OR PROHIBITION WITH RELATION TO AN ORDER DENYING A MOTION UNDER RULE 23 OF THE RULES OF CIVIL PROCEDURE, FOR THE COURT BELOW TO DETERMINE WHETHER AN ACTION IS TO BE MAINTAINED AS A CLASS ACTION, AND FOR NOTICE TO THE MEMBERS OF THE CLASS, WHICH ORDER AS BEEN APPEALED FROM TO THIS COURT IN NOS. 18939 and 18940.

Now come Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor, by their attorneys, A. Bradley Eben, Milton K. Joseph, Charles Liebman and Raymond I. Suekoff, and petition this court:

1. To issue a Writ of Mandamus directing the Respondent, the Honorable William J. Campbell, Judge, United States District Court for the Northern District of Illinois to vacate his order of November 6, 1970, entered in the case of *Roger Boshes, et al.* v. *General Motors Corporation*, No. 68C-1454, denying the motion of petitioners as plaintiffs in said case, which motion was made more than two years after the commencement of said case, that the court determine whether the action be maintained as a class action; and denying the motion made by these

petitioners as plaintiffs below as aforesaid, for notice to members of the class.

2. To issue a rule upon the Respondent, the Honorable William J. Campbell, to show cause why a writ of prohibition should not issue to prevent him from proceeding with the case below, and particularly with ruling upon the sufficiency of the complaint as amended below, until said Respondent shall have determined whether the case below shall be maintained as a class action, and until after the best notice practicable under the circumstances shall have been given to the class.

3. To issue its order staying proceedings in the District Court in said case No. 68C-1454, until this Court has disposed of this petition for a writ of mandamus and prohibition.

STATEMENT OF FACTS

The case below was brought on August 6, 1968, and is pending as an asserted class action, by the five plaintiffs as consumer-purchasers of General Motors automobiles, on behalf of all consumer-purchasers of General Motors automobiles within the four-year limitations period (15 U.S. C.A. § 15b) as a class, to recover damages for violation by General Motors Corporation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, and for other appropriate relief.

The plaintiffs are ordinary, average individuals of average means and resources. It is the policy of the law that they are "private attorneys general", acting in the public interest, as well as privately. *Flast* v. *Cohen,* 88 S.Ct. 1942, 1957, 1963; 382 U.S. 83, 109, 120; *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 15; 62 S.Ct. 875, 882.

The book value of General Motors' net worth is approximately $10 Billion. Its working capital is over $4 Billion.

The present market value of its common stock is over $23 Billion.

The filing of the suit below as a class suit tolled the four-year statute of limitations as to the members of the class. *Union Carbide* v. *Nisley*, 300 F.2d 561. *Esplin* v. *Hinchi*, 402 F.2d 94, Cert.den. 89 S.Ct. 1194; 394 U.S. 928; 22 L.Ed.2d 459. There seems to be no statutory or case law as to the effect on the class with regard to limitations of a determination by the court below (a) that there is no cause of action for damages; (b) that the case may not be maintained as a class action.

On March 23, 1970, defendant General Motors filed its motion to dismiss the complaint. The motion was taken under advisement by the District Judge, and while said motion of defendant to dismiss the complaint remained pending and undisposed of, plaintiffs on September 25, 1970 filed a motion for Rule 23 orders in words and figures as follows, to-wit:

"MOTION FOR RULE 23 ORDER

"Come now the plaintiffs and move the court to determine by order pursuant to Rule 23 of the Rules of Civil Procedure that this action is to be maintained as a class action, and to make such orders regarding notice to the members and alleged members of the class as may be appropriate or necessary under the Constitution, the laws, and the Rules."

This motion was based on Rule 23(c)(1) of the Rules of Civil Procedure for the United States District Courts, which reads as follows:

"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and

may be altered or amended before the decision on the merits."

This motion was further based on the First Amendment rights of freedom of communication and of assembly to petition the government for redress of grievances, and the Fifth Amendment right to due process of law, to be vindicated at this stage of the proceeding by affording appropriate notice and an opportunity for hearing to the members of plaintiffs' class.

It was the wish and purpose of plaintiffs as part of doing a conscientious job in representing the class to consult with other representative members of the class with regard to their position under the pending motion to dismiss, and with regard to the action to be taken thereunder.

On October 6, 1970, the Respondent, the Honorable William J. Campbell, denied the said motion, and entered an order in words and figures as follows, to-wit:

"Motion for orders under Rule 22 and Rule 23 denied."

In the colloquy in connection with the order, Respondent, the Honorable William J. Campbell, stated:

"Your motion is denied. I will rule on what is pending before me now, which was fully submitted. Following that, you have leave to reinstate your motion, if it appears appropriate."

Subsequently, on December 11, 1970, the Respondent entered an order dismissing the complaint insofar as it purports to state a claim based on Section 1 of the Sherman Act and the theory of an intra-corporate conspiracy; and in the same order stated:

"The motion . . . seeking a determination that this is a proper class action brought pursuant to Rule 23, and other questions under Rule 23 . . . will be considered if and when the court concludes that plaintiffs' complaint states a claim upon which relief can be granted."

Plaintiffs then appealed to this Court from the order of denial, which appeal is now pending (Nos. 18939 and 18940, Consolidated).

It being uncertain whether appeal or mandamus/prohibition is the proper remedy, plaintiffs below now bring this petition for mandamus and prohibition.

REASONS WHY THE WRIT SHOULD ISSUE.

I.

Because of the small amount which might be recovered by the plaintiffs individually, it would be totally irrational for plaintiffs to pursue their claims except as a class action. *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 566-567.

They will not pursue their claims as individuals, but only as members of the class, and on behalf of the class.

To permit General Motors to contest liability with each consumer-purchaser in a single, separate suit would give General Motors an advantage which would be equivalent to closing the door of justice to all small claimants. This is what the class suit practice was intended to prevent.

Weeks v. *Bareco Oil Co.,* 125 F.2d 84, 90

Hohmann v. *Packard Instrument Co.,* 399 F.2d 711,715.

The interlocutory order entered on December 11, 1970 finding no claim stated under Section 1 of the Sherman Act was adverse to the class. It was made without a finding that "extensive publicity has been given the case", or that the case has been given "widespread notoriety". See *Snyder* v. *Board of Trustees of University of Illinois,* 286 F. Supp. 927,931. No members of the class other than the plaintiffs had received a "full, accurate and complete description of the pending action." Compare *Schy* v. *Susquehanna Corporation,* 419 F.2d 1112, 1116.

II.

The District Court may not refuse to allow appellants to represent the class until they have proved their own right to relief. *Johnson* v. *Georgia Highway Express, Inc.* 417 F.2d 1122, 1124-1125.

The determination as to whether a class action should be maintained should be made and notice should be given at early stages of the litigation, particularly where other actions may be barred by the Statute of Limitations. *Green* v. *Wolf Corporation,* 406 F.2d 291, 298. See *Hale* v. *Ralston Purina Co.,* 432 F.2d 156.

Rule 23(c)(1) says that "*as soon as practicable* after the commencement of an action brought as a class action, the court *shall* determine by order whether it is to be so maintained". (Emphasis supplied.) An order under this subdivision may be conditional and may be altered or amended before decision on the merits.

The underlined language is significant. It implies a sense of urgency. *The District Court is not to wait until it determines that a cause of action exists. Kahn* v. *Rosenstiel,* 424 F.2d 161, 169.

It is not to wait until the District Court determines whether the complaint states a claim upon which relief might be granted, as the Respondent seems to have thought. Sections (a) and (b) of Rule 23, which detail the prerequisites of "representative parties on behalf of all" do not require "that the complaint state a claim upon which relief may be granted" as one of the prerequisites.

There is no question that there are millions of consumer-purchasers of cars whose position is identical to that of plaintiffs. There is no question that among these consumer-purchasers are the several States and their political subdivisions (State highway patrol cars, municipality police cars, cars for officials and public agency pools, etc.).

There is no question that General Motors is a $23 billion dollar corporation, whose resources to resist this suit are for all practical purposes limitless. There is no question that more than 2½ years have now passed since the filing of the suit.

It is perfectly practicable at this time for the District Court to determine by order whether this suit is to be maintained as a class suit. The wording of Rule 23(c)(1) is mandatory; the Rule uses the word "shall". See *Johnson* v. *City of Baton Rouge, La.*, 14 F.R.S.2d p. 737.

We respectfully direct this Court's attention to the fact that we ask no more in this mandamus proceeding than that the District Court *make a determination* at this time; we do not ask this Court to tell the District Court what the determination shall be (although we think it is clear that the determination must be in our favor).

We respectfully submit that, in the light of the wording of the rule, *the indefinite postponement of ruling on a request to make such a determination* constitutes an abuse of discretion, remediable by mandamus in this court. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 480; *Shutte* v. *Armco Steel Corp.* 431 F.2d 22; *Harper and Row Publishers, Inc.* v. *Decker*, 423 F.2d 487.

We also respectfully submit that in view of the serious question of the Statute of Limitations, as it may affect the members of the class who have no knowledge of the proceedings, due process requirements under the Fifth Amendment require that some kind of reasonable notice of the proceedings be given to the class at this stage, regardless of Rule 23(c)(2). *Clark* v. *American Marine Corp.*, 297 F. Supp. 1305.

Finally, we note that in the most recently reported cases, the Rule 23(c)(1) determination has been made at an early stage of the proceedings. *Gerstle* v. *Continental Airlines,*

14 Fed. Rules Service 2d 342; *Turnoff* v. *Nederlandsch, etc.*, 14 Fed. Rules Service 2d 408; *Cusack* v. *Nederlandsch, etc.*, 14 Fed. Rules Service 2d 415; *Philadelphia Electric Co.* v. *Anaconda America Brass Co.*, 42 F.R.D. 324; *Hurdy* v. *U.S. Steel Corporation*, 289 F.Supp. 200; *Weisman* v. *MCA, Inc.*, 45 F.R.D.559.

PRAYER FOR RELIEF

Wherefore, the petitioners, Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor, pray that this court:

1. Issue a writ of mandamus directing the Respondent, the Honorable William J. Campbell, to determine whether the action below, namely, the case of *Boshes, et al*, v. *General Motors Corporation*, No. 68C-1454, be maintained as a class suit.

2. Issue a writ of mandamus directing the Respondent, the Honorable William J. Campbell to direct appropriate notice to the members of the class or to representative members thereof in vindication of their Fifth Amendment due process rights, of the pendency of these proceedings, and the nature thereof.

3. Issue its order staying the proceedings in the trial court until this Court has determined whether the writ of mandamus or either of them prayed for in paragraphs 1 and 2 next above shall issue.

4. Make such other order as may be appropriate to vindicate the First Amendment and Fifth Amendment rights of plaintiffs and the members of their class.

Respectfully submitted,
A. Bradley Eben,
1 N. LaSalle St.
Chicago, Ill. 60602
Milton K. Joseph
Charles Liebman
Raymond I. Suekoff
120 W. Madison St.
Chicago, Ill. 60602
By /s/ Raymond I. Suekoff
Attorneys for Petitioners

STATE OF ILLINOIS)
COUNTY OF COOK) SS.

Raymond I. Suekoff, being first duly sworn, on oath says that he is one of the counsel for petitioners herein and that the allegations of fact in said petition contained are true.

/s/ Raymond I. Suekoff

Subscribed and sworn to before me
this 11th day of February, 1971.
/s/ Nancy Fitzgerald
Notory Public

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Friday, February 26, 1971
Before
Hon. LUTHER M. SWYGERT, Chief Judge
Hon. OTTO KERNER, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

ROGER BOSHES, et al.,
Petitioners,
v.
No. 71-1122
HONORABLE WILLIAM J. CAMPBELL, Judge
United States District Court,
Respondent.

Original Petition for Writ of Mandamus.

This matter comes before the Court on the original petition of Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor for writs of mandamus and/or prohibition with relation to an order denying a motion under Rule 23 of the Rules of Civil Procedure, for the Court below to determine whether an action is to be maintained as a class action, and for notice to the members of the class, which order has been appealed from to this Court in Nos. 18939 and 18940.

On consideration whereof, It Is Ordered and adjudged by this Court that the said original petition for writs of mandamus and/or prohibition be, and the same is hereby, denied.

A True Copy:
Teste:
/s/ Kenneth J. Carrick
Clerk of the United States
Court of Appeals for the
Seventh Circuit.
By /s/ H. K. McCormack
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, et al., Petitioners, v. HONORABLE WILLIAM J. CAMPBELL, United States District Judge, etc., Respondent.	No. 71-1122 Petition for Writ of Mandamus or Prohibition

PETITION FOR REHEARING, OR, IN THE ALTERNATIVE, TO VACATE THE ORDER OF DENIAL, AND TO FILE A NEW ORDER STATING THE REASONS FOR THE DENIAL OF THE PETITION FOR MANDAMUS.

(Filed March 11, 1971)

These petitioners most respectfully petition this Court, either to grant a rehearing herein, or to vacate the order of denial heretofore entered herein, and to file a new order stating the reasons for denial of the petition for mandamus.

These petitioners most respectfully suggest that the precedents cited in the Petition for Mandamus, together with the wording of Rule of Civil Procedure, 23 (c)(1): ". . . as soon as practicable . . .," indicate that the District Court may have deviated from the established practice, which is that determination as to whether a class action should be mentioned, should be made early in the proceedings, and are cogent reasons for this Court to discuss in an opinion the questions raised in this mandamus with regard to Rule of Civil Procedure 23 (c)(1), in order to

afford sorely needed guidance to the District Courts and to the Bar, in this era of proliferating class actions.

Respectfully submitted,
A. Bradley Eben
Raymond I. Suekoff
Milton K. Joseph
Charles Liebman
Attorneys for Petitioners
By /s/ Raymond I. Suekoff

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Tuesday, March 16, 1971

Before
Hon. LUTHER M. SWYGERT, Chief Judge
Hon. OTTO KERNER, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

ROGER BOSHES, et al.,
Petitioners,
No. 71-1122
v.
HONORABLE WILLIAM J. CAMPBELL, Judge
United States District Court,
Respondent.
} Original Petition for Writ of Mandamus.

This matter comes before the Court on petitioners' petition for rehearing, or, in the alternative, to vacate the order of denial, and to file a new order stating the reasons for the denial of the petition for mandamus.

On consideration whereof, the Court being fully advised in the premises,

It Is Ordered that said petition be and the same is hereby denied.

Respectfully submitted,

ANTHONY BRADLEY EBEN
MILTON K. JOSEPH
CHARLES LIEBMAN
RAYMOND I. SUEKOFF
Attorneys for Petitioners